

## Chapter Five

# Use and Continuity in the Customary Marine Tenure of the Whitsunday Islands

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This paper looks at some of the problems in identifying customary marine tenure (CMT) in the Whitsunday Islands of the central Queensland coast which is an area where, although continuous use can be demonstrated, detailed knowledge of the former clans and their estates are now largely unknown.

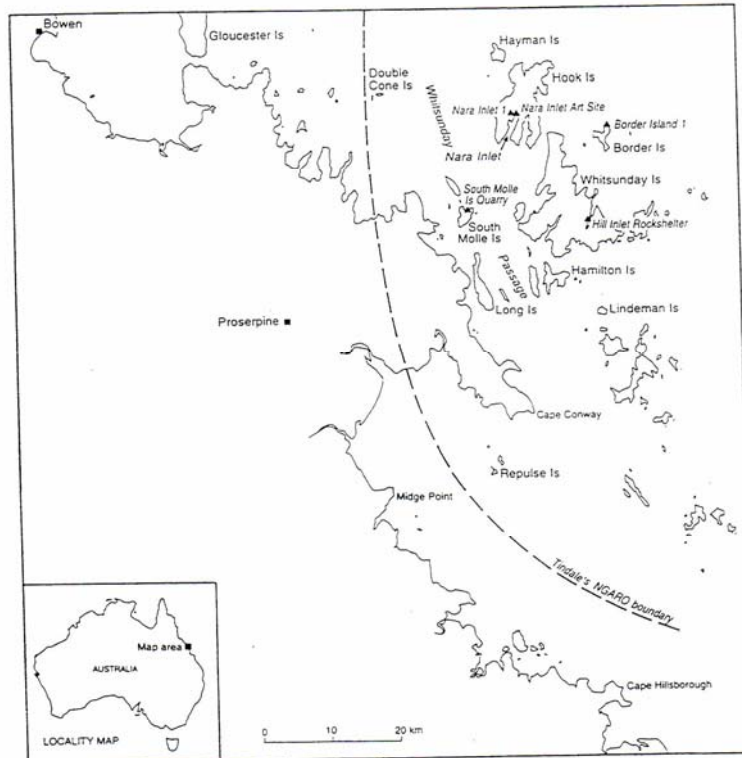
The contemporary community in the Whitsunday region is represented by the Giru Dala Council of Elders, an incorporated body which represents traditional and historical Aboriginal and Islander peoples in the region north of Bowen (Juru and Bindal), Collinsville (Birria), Proserpine, extending south to just north of Mackay (Gia) and the Whitsunday Islands [northern Cumberlands] (Ngaro) (Figure 5:1). Issues relating to native title in the Whitsundays were first raised when members of the Giru Dala Council of Elders expressed concern about aspects of the Great Barrier Reef Marine Park Authority's (GBRMPA) management of dugong and turtle populations within the park, especially as it relates to traditional hunting (I. Butterworth pers comm.). Under increasing pressure from GBRMPA, the Department of Environment, conservation groups and individual scientists to curtail and ultimately cease hunting these species, Giru Dala expressed concern that their traditional hunting of turtle and dugong was being blamed for the general decline in species numbers. It was in this context that I began to consider the possibilities of establishing native title under Mabo in the Whitsunday Islands and the possible native title ramifications if traditional hunting were banned. It should be made clear that the Giru Dala Council of Elders are not currently pursuing this direction, but have a general philosophy of self-sufficiency revolving around notions of wider community involvement and participation. In this context, and on their own initiative, the Giru Dala Council of Elders plays a significant role in the management and use of the Great Barrier Reef Marine Park, encompassing the central region of the Queensland Department of Environments National Park. At present they have considerable input into the strategic plan for the central region, have representatives on decision-making bodies relating to traditional hunting and fishing (specifically, dugong and turtle) and are consulted in regard to permit applications for tourist projects and developments.

Since the *Native Title Act (1993)* surprisingly little has been discussed about the status of sea-rights in regard to native title. Apart from sections 223 (1) and 223 (2) of the *Native Title Act (1993)*, which defines native title as including 'communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters including fishing rights and interests', very little of a specific nature relates to native title in sea country (*Mabo vs The State of Queensland* [No. 2] 1992). This is ironic given the pivotal role of Murray Islanders in bringing about the Act, a group who have been described as:

belonging to one of the most marine-oriented and sea-life dependent indigenous societies on the planet, [who] got native title to land above the high water mark but dropped sea claims due to insufficient evidence of traditional marine ownership (Cordell 1993:159).

Although the important role of the marine environment to Torres Strait cultures is generally recognised, this is not so much the case in relation to mainland Aboriginal peoples whose coastal use is often portrayed as a more shore-based system, revolving around estuarine mangrove communities and involving a large, often seasonal hinterland component. The

Figure 5:1 The Whitsunday Islands



perception of Australian Aboriginal groups as essentially land-based may be one of the contributing factors to the relative lack of recognition and discussion of CMT as it relates to mainland coastal Australia.

A recent regional archaeological study in the Whitsunday Islands on the central Queensland coast (Barker 1995) has shown that, as with other Queensland coastal peoples on Cape York and the Gulf of Carpentaria, a socio-economic system based on the sea was and is in place. From the historical and archaeological evidence it is clear that the Whitsunday peoples were a marine people who lived on the very fringe of the large steep inaccessible islands and derived their subsistence principally from the sea. These people had sophisticated three-piece bark and outrigger canoes in which historically and archaeologically documented open sea voyages of over 30km were a commonplace occurrence. Hunting of open sea biota including turtle, dugong and even whale was a major subsistence activity in which they utilised a complex marine hunting technology including detachable harpoons, bone, shell and turtle shell fishhooks and spears. This system is not just a case of 'boundaries of ancestral estates not ending at the shoreline' (Bergin and Lawrence 1993:32) hinting strongly at land as being more, or of equal importance to the sea. In the Whitsunday Islands, the evidence indicates that the sea, reefs and tidal flats were far more important than the land, and there is little evidence archaeologically that the terrestrial flora and fauna of the islands were economically utilised in any major way. The archaeology in the Whitsundays has demonstrated the continuous use of marine resources from 9000 years ago with major changes to a highly specialised maritime system from after 3000 years ago (Barker 1991). Marine resources predominate in all the sites excavated in the Whitsunday Islands. Although this should not be surprising, given that they are all coastal sites, it is clear that the coastal occupation and settlement pattern is an accurate reflection of a broader, essentially maritime system (Barker 1991, 1995, 1996).

In this context, there seems to be nothing to justify separating land and sea in regard to native title, something which I would argue has more to do with European notions of land as ownable and the sea as common property, than with indigenous notions of ownership and use. The lack of clear recognition/definition, both generally and under *Mabo* for native title claims based on notions of CMT, places indigenous claims to sea in an inferior position to that of land-based title claims, and sets up a false dichotomy between rights over land and sea.

The historical background to the Whitsunday Island peoples is an essential component in understanding their contemporary position in regard to native title. The Whitsunday people were first recorded by Cook in 1770, and from that time, they maintained continuous and largely mutually beneficial contact with shipping passing through Whitsunday Passage. Historical accounts of trade involving among other things, turtle and fish for bottles and nails, are also supported by the archaeology (Barker 1995). From 1860 when permanent mainland settlement in the region by Europeans began with the establishment of Port Denison (Bowen), relations deteriorated. From 1860 until 1879 there are five accounts of attacks on shipping, including the attack and burning of a schooner, the *Louisa Maria*, and numerous other shore-based skirmishes. In about 1879, in response to the attack and burning of the *Louisa Maria*, the Queensland Native Mounted Police were active in the area. This led to an account in 1881 of a frightened group of fifty island people consisting of some old people and some children, clustered around the Dent Island Lighthouse for protection (Coppinger 1883). It appears that most of these people were eventually taken to Port Denison (Bowen), which had a large fringe camp. It is clear, however, that the island people's physical presence persisted with occupation still in place in the late 19th century. For example, one of the contemporary elder's grandmother was born on Whitsunday Island, probably in the mid 1880s.

Walter Roth recorded Whitsunday Island people there in the late 1890s and Joseph W. Hawkes, a resident of South Molle Island, recorded a detailed 'dreaming' story told to him by 'Goolgatta' in 1901. Accounts of the island Aboriginal people being employed for logging, pastoral and early tourism ventures on the islands in the 1920/30s, as well as the recording of word lists from two individuals in the 1930s, all attest to the continuous physical presence of Whitsunday peoples from the late 19th century right through to contemporary times (Hawkes 1901; Roth 1910; Whitley 1936; Thora Nicholson pers comm.). All of the contemporary descendants, however, were born and live on the mainland, or Palm Island, Bowen, Proserpine and Mackay. 'Traditional' knowledge relating to the sea and islands still exists, consisting of stories relating to marine species, and knowledge of specific locations, including reef and mangrove systems as well as relating to the outer Barrier Reef itself.

Figure 5:2 Presence of turtle bone in Border Island 1 archaeological site

Date (years)	Excavation Unit	Depth (cm)	Weight (gms)
150	1	3.5	9.85
	2	9.8	8.97
	3	12.9	2.38
	4	15.6	
	5	17.4	5.52
	6	20.7	0.26
	7	23.0	2.42
3,089	8	26.8	54.50
	9	30.1	0.62
	10	32.1	2.77
	11	35.1	4.77
	12	37.8	12.20
6,940	13	40.9	3.80

It is clear from the archaeological and historical record that turtle and dugong hunting was one of the major subsistence activities of the Aboriginal people of the Whitsunday region, a practice which has been carried out from at least 6,940 years ago and became increasingly important after 3000 years ago. It is evident that turtle (and probably dugong) were a sustainable resource over thousands of years, providing the staple meat food for an estimated minimum of 100 people (Barker 1995). The Whitsunday peoples are now being pressured to cease a traditional subsistence activity in which there is clear evidence of sustainable use over thousands of years, including up until the period of massive tourism and recreation activity beginning from the late 1970s. It is clear that the Great Barrier Reef Marine Park Authority are reacting to the steady decline in numbers of turtle and dugong in the region, something Giru Dala have also been very much aware of. Obviously, Giru Dala along with the GBRMPA and other interest groups recognises the importance of conserving these species, which is why it voluntarily reduced its quota of dugong from 40 in 1994 to



30 in 1995 and just three in 1996, as well as introducing a voluntary ban on all turtle hunting in 1996. And yet as far as Giru Dala are concerned, the real issue of why turtle and dugong numbers continue to decrease has not been addressed by government agencies. The ecological impacts of the activities of developers, cane farmers, professional fisherman and tourist operators, all important economically in the local, regional, national and international settings, have not been targeted in the same way as those relating to traditional hunting.

Figure 5:3 The relative importance of dietary resources in archaeological sites in the Whitsunday region

	NII		NIAS		BII		HIRS1	
	kg	%	kg	%	kg	%	kg	%
Shellfish	978.2	7.7	685.8	14.5	102.3	2.9	1185.7	15.1
Fish	7999.2	63.6	364.0	7.7	1280.0	36.7	4368.0	55.8
Turtle	3520.0	28.0	3360.0	71.2	2100.0	60.3	1800.0	23.0
Terrestrial	65.1	0.5	303.8	6.4	—	—	465.0	5.9
TOTAL	12562.2		4713.6		3482.3		7818.7	

Consequently, the Giru Dala Council of Elders has drawn on the archaeological data relating to the traditional hunting and management of turtle and dugong to argue against the banning of hunting of these species and to demonstrate continuous 'traditional use'. For example, in the Border Island 1 site, turtle was hunted as a resource from initial occupation at just after 7000 years ago and is present continuously right up until the historical period (Figure 5:2). Furthermore, although the bulk of the cultural material in all the sites excavated is shellfish, it only comprised a small proportion of the overall dietary component. Fish and turtle were the two most important animal foods throughout. Together they contributed 91.6% of meat weights at Nara Inlet 1, 78.9% at Nara Inlet Art Site, 78.8% at Hill Inlet Rockshelter 1 and 97.0% at Border Island 1. In contrast, terrestrial fauna never contributed more than 7% of total meat weights and shellfish contributed a maximum of only 15.1%. Overall, fish comprised 49% of the total meat in all the sites, turtle comprised 37.7%, shellfish comprised 10.3% and terrestrial fauna comprised 2.9% (Figure 5:3). Although no dugong bone has been excavated, the prehistoric technology was fully geared to the hunting of large marine mammals including, possibly, whale, and there is no reason to doubt that dugong was taken in prehistory. Indeed dugong hunting was a major subsistence activity described historically and there are well documented taphonomic and cultural reasons as to why dugong bone is not found archaeologically (Minnegal 1984, Barker 1995).

Despite the external pressures and voluntary restrictions, the contemporary Aboriginal communities' strongest links to the islands and sea today relate to their enduring use of the marine subsistence base, especially of turtle and dugong. For all the descendants young and old, turtle and dugong were and are important food sources for the community. These particular foods are especially important during occasions such as family gatherings and other community occasions.

From my informal discussions with Giru Dala members, it emerged that their notions of CMT are almost wholly linked to *use* in regard to hunting dugong and turtle. It could be said from the archaeological, historical and anthropological evidence that Giru Dala can demonstrate continuous hunting and fishing in the Whitsunday Islands and that this fulfils the condition under the *Native Title Act (1993)* that the indigenous inhabitants must have maintained a continuous connection with the land according to the group's traditional laws and customs in order for native title to still exist. Furthermore, it could be argued that Giru Dala's exemptions from state laws banning the killing of turtle and dugong constitute tacit acknowledgment of prior use and proprietary rights.

Ultimately it is the role of the National Native Title Tribunal, the Queensland Native Title Tribunal or the Federal Court to rule whether or not a continuous connection has been maintained by the indigenous inhabitants in the Whitsundays. I believe that this connection is clearly demonstrable. However, even taking into account the proviso in the Act that the Tribunal acknowledge the changing nature of cultures, it may be problematic as to whether continuous resource procurement and use on its own will be enough to prove native title has not been extinguished. For example, Justice Brennan emphasised the need for the occupancy or connection to be *in accord with a system of laws and customs* of a community or society (Bartlett 1993:10). Indeed findings by Justices Brennan, Deane and Gaudron further elaborate on this point by stating that native title rests in a traditional connection with or occupation of the land under the *laws and customs of the group and that the substantial maintenance of the connection must be established* (Bartlett 1993:10). Just what type and to what degree claimants are expected to have maintained traditional connection according to laws and customs is unclear. I agree with Cordell (1993:163), who states:

CMT traditions are dynamic, living customs; nowhere are they 'pure' traditions. There is no question that colonial impacts on indigenous groups, beginning with the frontier experience, [consequent enculturation], interaction with European legal institutions, commodity market exploitation of marine products have all modified local custom. The point is, however, while CMT may not be what they once were, and cannot live up to some idealised past (a fictive state usually constructed by Europeans), they should not be regarded as broken-down traditions, but living customs linked to basic livelihood and resource management tasks, which Islanders and Aborigines constantly relate to new conditions, incorporating new knowledge.

Native title has ostensibly been extinguished already over large areas of the coastal shoreline in the Whitsundays by past grants of certain leasehold interests, specifically relating to tourism, as well as in land lying under tidal navigable rivers or streams, existing canal estates, under designated Queensland harbours and, significantly, in all coastal land between high and low water mark. Although this relates to land under sea, the extinguishment of native title in coastal land between high and low water mark effectively deprives coastal peoples of control over a major component of their resource base. This is especially so in the Whitsundays where there is a tidal range of over 4 metres. This encompasses vast areas of mangrove, fringing reef and mud flat, as well as a range of significant cultural sites such as fishtraps and a stone arrangement. Furthermore, this is the zone of development in the region with the greatest impact in regard to the sea and its resources, encompassing as it does marina developments, canal estates and various tourism ventures.

If the Native Title Tribunal does find that the demonstrated continuous resource use of the Whitsunday region constitutes a traditional connection with or occupation of the land and sea under the laws and customs of the group, and therefore determine that native title exists, then the issue of

turtle and dugong hunting becomes crucial. If in this context, GBRMPA bans traditional hunting then it may be effectively extinguishing native title. If native title hinges on traditional hunting it is imperative that it continues to ensure native title is not extinguished.

To conclude, it would appear that the recognition of customary marine tenure in the Whitsunday Islands, and in many other coastal domains in Australia, would generally centre on interpretations of continuity of use and how the notion of use according to custom and laws is established or interpreted. I suspect that it will ultimately be found that a considerable gap will emerge between contemporary indigenous concepts of CMT and legal definitions of the same.

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